

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CC CHURCH

Claimant

VS.

TAP ENTERPRISES

Self-Insured Respondent

Docket No. 1,033,266

ORDER

Claimant requests review of the June 5, 2008 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

The Administrative Law Judge (ALJ) found that the claimant "failed to prove a psychological injury directly traceable to the work-related back injury" and thereafter denied claimant's request for psychological treatment.¹ He also denied the claimant's request for temporary total disability (TTD) stating that the claimant failed to prove he was incapable of substantial gainful employment on account of his work injury.²

The claimant appealed this Order and alleges the ALJ erred. He argues that the uncontroverted medical evidence establishes that his present need for psychological treatment and TTD stems from his compensable work injury and its aftermath.

Respondent and its insurance carrier (respondent) contend that the ALJ's decision is fully supported by the evidence. Respondent explains that claimant's own expert indicated that it is claimant's preexisting psychiatric condition that is driving claimant's post-injury pain syndrome, rather than his reaction to his present condition, and that he has now

¹ ALJ Order (June 5, 2008) at 3.

² *Id.*

recovered from the orthopaedic aspect of his work injury.³ Respondent further argues that claimant's present inability to work is due to his failure to address his need for a commercial driver's license and not due to any psychiatric or orthopaedic condition or limitations. Thus, respondent argues that the ALJ's preliminary hearing Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

The ALJ's Order sets out the facts in great detail and this Board Member adopts that recitation as her own. Highly summarized, claimant suffered a compensable injury to his low back in October or November 2005. He treated conservatively with a chiropractor and continued to work. Then, on July 5, 2006, claimant had an incident at home when he bent over. Respondent provided medical treatment for the increased symptoms and eventually a hemilaminectomy and nerve root decompression was performed on July 8, 2006. Since that surgery claimant returned to work but his symptoms flared up again. He had surgery again on March 30, 2007 and was released to return to work with restrictions.

Respondent offered claimant an accommodated position but he apparently suffered a seizure in August 2007 which prevents him from obtaining a commercial driver's license. And he is functionally illiterate and believes that his limited reading abilities would make that job impossible to perform. Thus, claimant maintains he is unable to perform the accommodated job and is entitled to TTD benefits.

Claimant sought out unauthorized treatment from Dr. Prostic who has opined that while claimant has had a good response to his second operation, his symptoms are out of proportion to his physical and radiologic findings. He went on to suggest that it is unlikely that claimant will respond to any further orthopaedic treatment but he "strongly suggested" that claimant be evaluated by a psychotherapist.⁴ Finally, he declared that claimant was temporarily and totally disabled from gainful employment.⁵

At his lawyer's request claimant was then seen by Dr. Pro, a psychiatrist who opined that claimant's low back injuries aggravated a preexisting depressive disorder, giving rise to a pain syndrome and inflamed a preexisting personality disorder. He also opined that claimant's seizure was a reaction to the Wellbutrin he was prescribed following his most

³ Respondent's Brief at 10 (filed July 10, 2008).

⁴ P.H. Trans., Cl. Ex. 3 at 3 (Dr. Prostic's Oct. 19, 2007 report).

⁵ *Id.*

recent surgery. Dr. Pro suggested a course of treatment which included therapy and medications. But respondent was unwilling to provide this treatment.

Respondent had claimant examined by Dr. DeSilva, a neurologist, for purposes of exploring the source of claimant's alleged seizure. Dr. DeSilva reviewed claimant's neurological tests (including a CT scan, drug screen, EKG) and all were normal. She believed that there was no seizure but rather, attributed the episode as well as claimant's subsequent episodes of sleepiness, dizziness and forgetfulness, to sleep apnea. She also declared that sleep apnea would disqualify claimant from the truck driving job.

Claimant was also examined by Dr. Jerome Hanson on March 20, 2008 at respondent's request. Dr. Hanson determined that the claimant was able to work at a medium physical demand level and could lift up to 50 pounds, but should avoid prolonged sitting and frequent bending. Dr. Hanson opined that he agreed with Dr. Prostic and believed that the claimant "has both symptom magnification and a somatoform disorder which is unrelated to his alleged work-related impairment" and that claimant's "symptoms developed acutely when he bent over at his home and engaged in an activity which was completely unrelated to his work".⁶ Dr. Hanson indicated claimant was able to work and perform substantial gainful employment.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁷ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁸

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁹

The ALJ concluded that "there was substantial credible evidence that the claimant had low back and left leg problems that resulted from his work duties." And that finding is apparently not in dispute for purposes of this appeal. The ALJ went on to find that "[t]he

⁶ P.H. Trans., Resp. Ex. 4 at 15 (Dr. Hanson's IME report dated March 20, 2008).

⁷ K.S.A. 2005 Supp. 44-501(a).

⁸ K.S.A. 2005 Supp. 44-508(g).

⁹ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

only issue is whether the claimant is in need of psychological treatment related to a work injury.”¹⁰

The ALJ denied claimant’s request and in doing so, offered the following reasoning:

In the present case, the claimant had a pretty good recovery from his physical injury. It did not appear to be the physical effects of his injury that caused or contributed to his psychological issues, but rather the fact that the claimant could not work, and there was more to the claimant’s unemployment than simply the back injury. The claimant could have been employed as a truck driver but for his “seizure.” There was less than a preponderance of evidence that there even was a seizure. The problem appeared to be just as likely traceable to sleep apnea, and there wasn’t any evidence that sleep apnea resulted from the back injury.

Add to this fact of the July 5, 2006 non-work related back injury, which appeared to be the most injurious event, and the trace from the claimant’s compensable injury to his need for psychological treatment becomes quite obscured. The claimant failed to prove a psychological injury directly traceable to the work-related back injury. His request for treatment of psychological conditions is denied.¹¹

The ALJ also denied claimant’s request for TTD benefits as claimant failed, in his view, to prove that he is incapable of substantial gainful employment due to the work-related injury.¹²

Claimant appealed this Order and strenuously argues that his present need for psychiatric treatment is directly traceable to his work-related accident based on uncontroverted evidence. Claimant maintains that he suffered a series of repetitive injuries while working. And while conservative treatment was not helping him, he was scheduled for further evaluation including an MRI. Before that test could be performed, he bent down to reach for something at home in July 2006 and suffered extreme pain. He received further treatment which included two surgeries and medications. One of those medications, Wellbutrin, is thought to have caused a seizure which now disqualifies claimant from respondent’s accommodated job offer. Claimant’s medical evidence supports his argument that the work-related event triggered a cascade of symptoms and circumstances that have now led to his need for psychological treatment.

On the other hand, respondent contends that the causal connection between the initial accident and his present need for treatment (which the physicians’ agree he requires) is lacking. Respondent asserts that claimant’s psychological issues admittedly pre-dated

¹⁰ ALJ Order (June 5, 2008) at 2.

¹¹ *Id.* at 2-3.

¹² *Id.* at 3.

his original work-related accident and also that his present need for treatment stems from non-work related issues that have occurred since his accident. Put another way, claimant's psychological issues related to his inability to work are not due to his work-related accident but are attributable to his alleged seizure and his illiteracy.

Like the ALJ, this Board Member concludes that claimant's orthopaedic issues appear to be resolved, or at least not in need of any further treatment at this time. But as to the need for psychiatric treatment this member finds this to be a close decision. Admittedly claimant had a preexisting psychological condition. And his limited reading abilities were a condition that also predated his 2005 accident.

Based upon this record, this Board Member finds, by the barest of margins, that claimant's present need for psychiatric treatment is causally related to his 2005 work-related accident. This finding is based on the fact that claimant's symptoms following that accident apparently continued and never resolved. And there is no evidence within this record that suggests that the July 5, 2006 accident was a wholly independent and intervening accident, such that respondent's liability was terminated. Moreover, claimant may have had some preexisting psychological issues, Dr. Pro has indicated that this accident aggravated that condition and under Kansas law, an aggravation of a preexisting condition is a compensable event.

Accordingly, the ALJ's Order relating to the need for psychological or psychiatric treatment is reversed and respondent is directed to provide claimant with a list of 3 physicians who specialize in psychological or psychiatric matters, from which claimant can select one to direct his treatment.

As for the ALJ's denial of TTD benefits, this issue is solely within the province of the ALJ and there is no jurisdiction to consider that denial of benefits from a preliminary hearing.¹³

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.¹⁴ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated June 5, 2008, is reversed in part and dismissed in part.

¹³ K.S.A. 44-534a.

¹⁴ *Id.*

IT IS SO ORDERED.

Dated this _____ day of August 2008.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Geoffrey Clark, Attorney for Claimant
Kevin J. Kruse, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge